Supreme Court, U.S.
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No. __-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RED LAKE BAND OF CHIPPEWA INDIANS,
on its own behalf
and on behalf of its members;
GERALD F. BRUN; LUELLA R. BRUN,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
for the Eighth Circuit

January 10, 1996

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QUESTIONS PRESENTED FOR REVIEW

1. May the meaning, interpretation, and construction of Indian treaties be determined without reference to fact finding concerning the intent and understanding of the Indian signatories of those treaties? *Choctaw Nation v. United States*, 318 U.S. 423 (1943); *Jones v. Meehan*, 175 U.S. 1 (1879); *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 568 (1979).

2. Did the Indian signatories to the Red Lake Chippewa treaties with the United States intend and understand that severance and the sale of timber within their lands, reserved for their exclusive use and occupancy, would be subject to taxation by the federal government?

3. Did the district court and court of appeals err by refusing to allow presentation of evidence as to the understanding of the Indian signatories to the Red Lake Chippewa treaties with the United States for the purposes of interpreting and construing the terms of those treaties and by granting summary judgment without considering such evidence? *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 568 (1979); Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

4. Do treaties between the United States' government and the Red Lake Band of Chippewa Indians allow the federal government to impose an income tax on the proceeds of the sale of tribally owned timber logged by a tribal member within the Red Lake Reservation? Treaty of Greeneville, 7 Stat. 49; Treaty of Old Crossing, 13 Stat. 667; Supplement to Treaty of Old Crossing, 13 Stat. 689; *Choctaw Nation v. United States*, 318 U.S. 423 (1943).

5. Does imposition of a federal income tax on income from tribally owned natural resources infringe upon Red Lake Chippewa tribal self-government under the facts of this case?

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D. Judgment In A Civil Case, U.S. District Court, District of Minnesota, dated August 29, 1994.

E. Order [Unpublished], U.S. Court of Appeals for the Eighth Circuit, dated August 10, 1995.

F. Order, U.S. Court of Appeals for the Eighth Circuit, dated October 12, 1995.

G. The Treaty of Old Crossing, 13 Stat. 667 (1863), *reprinted in* II C. Kappler 853, Indian Affairs, Laws and Treaties (2d ed. 1904).

H. The Supplement to Treaty of Old Crossing, 13 Stat. 689 (1864), *reprinted in* II C. Kappler 861, Indian Affairs, Laws and Treaties (2d ed. 1904).

I. The Treaty of Greeneville, 7 Stat. 49 (1795), *reprinted in* II C. Kappler 39, Indian Affairs, Laws and Treaties (2d ed. 1904).

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TABLE OF AUTHORITIES

Cases

Adickes v. S. H. Kress & Co.,
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Choctaw Nation v. United States
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Commercial Union Insurance Co. v. Schmidt,
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County of Oneida v. Oneida Indian Nation,
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EEOC v. Cherokee Nation,
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Lujan v. National Wildlife Federation,
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McClanahan v. Arizona State Tax Comm'n.,
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Montana v. Blackfeet Tribe of Indians,
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Northland Greyhound Lines v. Amalgamated Ass'n.,
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Oklahoma Tax Commission v. Chickasaw Nation,
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Portsmouth Square, Inc., v. Shareholders Protective Committee,
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United States v. Sioux Nation,
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United States v. Winans,
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United States v. Winnebago Tribe of Nebraska,
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Walling v. Fairmont Creamery Co.,
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Washington Post Co. v. Keogh,
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Washington v. Fishing Vessel Ass'n.
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Whitefoot v. United States,
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Winters v. United States
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25 U.S.C. § 117 18

25 U.S.C. §§ 461-479 16

25 U.S.C. §§ 476-477 17

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28 U.S.C. § 1346 3

28 U.S.C. § 1331 3

28 U.S.C. § 1340 3

28 U.S.C. § 1361 3

Supplement to Treaty of Old Crossing,
13 Stat. 689 (1864), *reprinted in*
II C. Kappler 861, Indian Affairs, Laws
and Treaties (2d ed. 1904) ..... i, 2, 4, 17

Treaty of Dancing Rabbit Creek,
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Treaty of Greeneville, 7 Stat. 49 (1795),
reprinted in II C. Kappler 39, Indian Affairs,
Laws and Treaties (2d ed. 1904) ..... i, 2, 4, 5, 14, 17

Treaty of Old Crossing, 13 Stat. 667 (1863)
reprinted in II C. Kappler 853, Indian Affairs,
Laws and Treaties (2d ed. 1904) ..... i, 2, 4, 16, 17

Legislative, Administrative, Judicial, and Executive Materials

Fed. R. App. P. 4 4

Fed. R. Civ. P. 56 ..... 18, 20, 21

House Ways and Means Committee,
Tax Treatment of Indian Fishing Rights Income,
H.R. Rep. No. 312 Part 2,
100th Cong., 2d Sess., at 4 (1988) 16

Pub. L. 98-64 18

Rev. Rul. 94-12 18

Other Authorities

10A Wright, Miller & Kane § 2727, p. 138-43 21

Felix S. Cohen's Handbook of Federal Indian Law,
(Renard Strickland ed., 2d ed. Michie 1982) 13, 16

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1. OPINIONS BELOW

Order, U.S. District Court, District of Columbia, dated September 24, 1992 (Appendix A hereto).

Order, U.S. District Court, District of Columbia, dated October 27, 1992 (Appendix B hereto).

Memorandum Opinion and Order, U.S. District Court, District of Minnesota, dated August 26, 1994 (Appendix C hereto).

Judgment In A Civil Case, U.S. District Court, District of Minnesota, dated August 29, 1994 (Appendix D hereto).

Order [Unpublished], U.S. Court of Appeals for the Eighth Circuit, dated August 10, 1995 (Appendix E hereto).

Order, U.S. Court of Appeals for the Eighth Circuit, dated October 12, 1995 (Appendix F hereto).

2. STATEMENT OF SUPREME COURT JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C § 1254(1). The U.S. Court of Appeals for the Eighth Circuit's substantive order was issued August 10, 1995 (Appendix C hereto). The Court of Appeal's order denying petitioner's request for rehearing was entered October 12, 1995 (Appendix F hereto). The Court of Appeal decided federal questions concerning the implementation of the federal income tax and the interpretation and intent of treaties between and Indian tribe and the United States government in a way which conflicts with applicable decisions of this Court.

3. TREATIES AND STATUTES INVOLVED

1. The Treaty of Old Crossing, 13 Stat. 667 (1863), *reprinted in* II C. Kappler 853, Indian Affairs, Laws and Treaties (2d ed. 1904) (hereafter "C. Kappler") (Appendix G hereto).

2. The Supplement to Treaty of Old Crossing, 13 Stat. 689 (1864), *reprinted in* II C. Kappler 861, Indian Affairs, Laws and Treaties (2d ed. 1904) (Appendix H hereto).

3. The Treaty of Greeneville, 7 Stat. 49 (1795), *reprinted in* II C. Kappler 39, Indian Affairs, Laws and Treaties (2d ed. 1904) (Appendix I hereto).

4. 26 U.S.C. 1(a)

> (a) MARRIED INDIVIDUALS FILING JOINT RETURNS AND SURVIVING SPOUSES. -- There is hereby imposed on the taxable income of --
>
> (1) Every married individual . . . a tax determined in accordance with the following table:
>
> . . .

4. STATEMENT OF THE CASE

4.1 Introduction.

This case involves the meaning of Indian treaties and the right of present day Indians to receive the benefits of those treaties. Specifically at issue is the right of the Red Lake Chippewa people to harvest tribal timber free of imposition of the federal income tax. This court has determined that no income tax shall be imposed on the timber revenues received by an individual Indian from timber harvest on his **individual** land. *Squire v. Capoeman,* 351 U.S. 1 (1956). Here, it is **tribally** owned timber which is harvested by tribal members Gerald and Luella Brun (Petitioners Brun). The Red Lake Band reserved that timber for the beneficial use of its people in the Bands' treaties with the United States and which the Band maintains reserved the use of tribal natural resources free from taxation.

4.2 Jurisdiction Below.

The District Court had jurisdiction over the Brun petitioners' claims pursuant to 28 U.S.C. § 1331, in that the matter in controversy arises under the Constitution and laws of the United States; pursuant to 28 U.S.C. § 1361, in that it is in the nature of mandamus to compel officers and employees of an agency of the United States to perform duties owed to the Brun petitioners; and pursuant to 28 U.S.C. §§ 1340 and 1346, in that district courts have original jurisdiction for any civil action against the United States as defendant for recovery of any internal revenue tax which has been erroneously or illegally assessed and collected against the Brun petitioners.

The Bruns paid the taxes assessed and met all statutory and regulatory requirements for filing their complaint for refund. 26 U.S.C. § 7422. [1]

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[1] The Bruns filed a refund claim for 1983 in the amount of $22,944.06, more than six months prior to the filing of the action below. The Internal Revenue Service, by letter dated April 23, 1990, notified petitioners Brun that their claim for 1983 was denied.

The Bruns filed a refund claim for 1984 in the

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 providing that courts of appeal shall have jurisdiction of all appeals from all final decisions of the district courts of the United States. The district court entered a final order dismissing the complaint on August 26, 1994, and a judgment on August 29, 1994. The Notice of Appeal, dated October 13, 1994, was filed with the district court on October 20, 1994, within the 60 days required by statute where the United States is a party. Fed. R. App. P. 4.

4.3 Summary of the Case.

The Red Lake Band of Chippewa Indians (hereinafter "the Band") is the political successor in interest to the Red Lake Band of Chippewa Indians which executed two treaties with the United States government. *I.e.*, the Treaty of Old Crossing, 13 Stat. 667 (1863), *reprinted in* II C. Kappler, Indian Affairs, Laws and Treaties 853 (2d ed. 1904) (hereafter "C. Kappler"), Appendix G; and the Supplement to Treaty of Old Crossing, 13 Stat. 689 (1864), *reprinted in* II C. Kappler 861, Appendix H.

In addition, the Treaty of Greeneville covered lands occupied by the Band (Treaty of Greeneville, 7 Stat. 49 (1795), *reprinted in* II C. Kappler). Declaration of Melissa Meyer, Ph.D., dated May 27, 1994, (Filed with the District Court) pp. 3-5 (hereinafter "Meyer Decl.")(Appendix J).

Article V of the Treaty of Greeneville explicitly reserves to the Band the right to quiet enjoyment of certain lands:

> To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the

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amount of $9,024.45, more than six months prior to the filing of the action below. The Internal Revenue Service, by letter dated April 23, 1990, notified petitioners Brun that their claim for 1984 was denied.

The Bruns filed a refund claim for 1985 in the amount of $4,608.74, more than six months prior to the filing of the action below. The Internal Revenue Service later disallowed the Brun petitioners' claim for refund.

> meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States. . . . [Until the Tribes' lands are sold to the United States,] the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States . . . .

Treaty of Greeneville, art. V, II C. Kappler at 42.

Since "these lands" include the areas inhabited by the Red Lake Band, the Band is clearly a beneficiary of that clause. *See, Jourdain v. Commissioner*, 617 F.2d 507 (8th Cir. 1980).

The purposes of these treaties were to provide a homeland for tribal members within which the Band could determine tribal governmental policies and prerogatives.

Uncontroverted evidence presented by petitioners demonstrated that Red Lake Chippewa leaders would not have intended that tribal resources be taxed.

As a result of those treaties and subsequent executive orders and acts of Congress, the Red Lake Band today inhabits its reservation on ancestral grounds.

Petitioners Brun are enrolled members of the Red Lake Band and reside on the Red Lake Indian Reservation in the State of Minnesota. As such they are the beneficiaries of the rights guaranteed by treaty.

Pursuant to a tribal policy and permitting system, appellant Gerald Brun cut, skidded and hauled logs to a buyer in 1983, 1984, and 1985. The Internal Revenue Service assessed taxes on the income produced by that activity. The Bruns paid the taxes under protest and brought timely suit for refund in the federal district court.

This case was originally filed in the United States District Court for the District of Columbia (Cause No. 92-0976). It was brought by petitioners Red Lake Band of Chippewa Indians on its own behalf and as *parens patriae* on behalf of its members for

declaratory judgment and other relief. Petitioners Brun also sued on their own behalf seeking a tax refund and other appropriate relief.

In the Complaint, the documents presented and the expert testimony, The Band and Petitioners Brun demonstrated that the harvest of tribal forest products provides benefits to the members of the Band.

A federally approved timber cutting permit is the primary instrument used to sell tribal timber on the Red Lake Diminished Reservation. On the Diminished portion of the Red Lake Reservation, only tribal members may be granted a permit to harvest and sell timber.[2]

Under this permitting system, the Brun petitioners purchased from the Bureau of Indian Affairs Forestry Agent (Red Lake Agency) tribal stumpage located on the Red Lake Reservation and cut, skidded, and hauled the logs to a buyer. Complaint. ¶ 5.13.

Revenue from timber sales is vital to the Band, for it allows the Band to provide essential governmental services to its members residing on the Reservation. Complaint. ¶ 5.7.

Natural resources still serve as the basis for virtually all non-governmental employment on the Red Lake Reservation. Meyer Decl., Appendix J, p. 74a.

The Red Lake Reservation economy still relies heavily on natural resources upon which the people have relied for generations, including timber. *Id.*

Until relatively recently, tribal sawmills have served as a source of reservation income for more than fifty years providing nearly one-third of the non-public employment on the reservation. *Id.*, p. 75a. As sawmill operations have declined, tribal members,

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[2] *See, e.g.,* U.S. Department of Interior, Bureau of Indian Affairs, Red Lake Agency, "Policy Statement for Cutting of Forest Products Under Permit on Lands of the Red Lake Band of Chippewa Indians (FY 1981)", originally submitted as an exhibit below.

like the Bruns, have come to rely more on the older tradition of individual timber sales. *Id.*, p. 76a.

Commercial rice operations in other states have depressed that agricultural enterprise increasing the dependence on other natural resources such as timber. *Id.*

Economic conditions at Red Lake fall below the national average for Indians. The average unemployment rate approaches, and seasonally surpasses, fifty percent. The average per capita income falls below the poverty level. *Id.*, p. 30.

None of these facts were controverted by the United States.

By order dated September 24, 1992, the district judge granted a motion to dismiss brought by the federal government on the grounds that, (a) venue was improper for Petitioners Brun' refund claim and, (b) the court lacked jurisdiction over the Band's claims under the Declaratory Judgment and Anti-Injunction Acts. Upon reconsideration, the order dismissing petitioners Brun' refund claim was vacated and the matter was ordered transferred to the District of Minnesota on October 27, 1992. Appendix B.

By clerk's notice of November 25, 1992, the transfer was completed. The dismissal of the Band's actions was not appealed nor transferred and no issue is presented here concerning that dismissal.

After transfer to the district court in Minnesota, a motion for summary judgment was filed by defendant United States on January 24, 1994. On August 26, 1994, the district court granted that motion and dismissed the complaint. Appendix C.

A timely appeal was filed with the Court of Appeals for the Eighth Circuit.

In its opinion of August 10, 1995, the Court of Appeals issued a ruling finding, that as a matter of law, federal income tax applied to income generated from tribal timber resources on the Red Lake Reservation when such resources were logged and sold by an individual member of the Red Lake Chippewa Band pursuant to tribal permission. Appendix E.

A timely petition for rehearing was filed with the Circuit Court requesting review *inter alia*, on the basis of *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214 (1995). That decision was decided on June 14, 1995, too late to be considered by the Court of Appeals since the case had been submitted on June 12, 1995. The petition for rehearing was denied on October 12, 1995. Appendix F.

5. ARGUMENT

5.1 Introduction.

In its opinion of August 10, 1995, the Court of Appeals did not follow the analysis mandated by existing law nor by the latest decision of the United States Supreme Court concerning treaty rights and taxation. *See, Oklahoma Tax Commission v. Chickasaw Nation,* 115 S.Ct. 2214 (1995).

The Court's decision conflicts with applicable decisions of this Court concerning well known principles of treaty construction, including the tenet requiring determination of the intent of a treaty, by refusing to require the court below to hold a hearing, consider anthropological and historical evidence, and take other evidence concerning the intent of the treaty signers.

The intent of the Chippewa Indian signers of the treaties is central to such a determination. The court below refused to determine that intent, contrary to established Indian law principles and decent decisions of this Court including *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214 (1995).

Finally, the Courts below decided summary judgment issues in conflict with applicable decisions of this court.

5.2 The Court of Appeals Decision Violates Well Established Rules of Treaty Construction.

On June 14, 1995, this Court decided *Oklahoma Tax Commission v. Chickasaw Nation, supra*. That case involved two state taxes. The first, a motor fuels tax on the retail sales of fuel sold by the tribe, is not involved here, nor does the reasoning involved in that case have application here. The second tax was a state income tax on the wages from tribal employment of an

Indian working on the reservation but residing in the State of Oklahoma outside of Indian country. The reasoning of the court as to the second tax follows existing practice and reinforces it. The courts below failed to utilize this analysis.

The Supreme Court's decision concerning imposition of an income tax was by a split five-to-four vote. The majority held that Oklahoma could impose its income tax on its resident, even though that resident was an Indian whose wages came from reservation income. It is the analysis by which both that majority, as well as the dissenting minority of four, analyzed the case which is instructive to the case at bar.

The majority, while citing rules concerning income taxation of residents by a sovereign authority, also went on to analyze the Treaty of Dancing Rabbit Creek involved in that case. Treaty of September 27, 1830, 7 Stat. 333-334. That treaty, like the treaties involved in this case, had no language whatsoever about taxation. The Treaty of Dancing Rabbit Creek did, however, provide that the Chickasaw Nation was promised ". . . that no territory or state shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . . but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all [such] laws . . ." *Oklahoma, supra*, p. 2223. The court evaluated that argument and applied the rule of liberal construction. *Oklahoma, supra,* at p. 2224, *citing County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985). In finding no exemption, the court noted that the treaty had a "clear geographic limit" and, therefore, the subject clause did not apply to persons who lived outside the Chickasaw Nation's limits.

More importantly, however, for our purposes, is the fact that the Court engaged in an analysis of treaty intent and purpose. The court considered what the intent and the purpose of the treaty was and made a finding concerning the treaty that the "purpose of the Treaty was to put distance between the Tribe and the States." *Oklahoma, supra,* p. 2224. In so doing, the court cited historical materials and information. *Id.* Thus the majority, while finding against the tribe on the merits of state taxation, applied precisely the analysis requested by the Red Lake Band and the Bruns in this case, namely, that it is necessary to find the purpose and intent of a treaty from historical materials, even though a treaty has no explicit language concerning taxation.

The dissenting minority of four[3] also made it clear that the "issue is whether such a tax falls within the scope of a promise this Nation made to the Chickasaw Nation in 1837 . . ." *Oklahoma, supra,* p. 2225. The minority also reviewed historical materials to find out what the intent of the treaty was. The minority found that the "language of the promise, read broadly and in light of its purpose, fits the tax at issue." *Oklahoma, id.* The minority also cited the well known rules of treaty construction, including *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985). *Oklahoma, supra,* p. 2226.

Thus, although a majority of the court came to a different view on the merits of what the intent and purpose of the treaty was, all nine justices agreed on the analysis to be conducted, namely resort to historical materials to construe the intent of the treaty, even though there was no facial ambiguity nor specific nor implicit terms in the treaty concerning tax matters.

The Courts below failed to undertake such an analysis in this case, and this constitutes error. The intent of the treaty signers, and the treaty's underlying purposes, must be investigated by the court before a decision on the intent of the treaty can be rendered that is consistent with the ruling in *Oklahoma, supra.*

Since before Euro-American immigration, members of the Red Lake Band of Chippewa dwelled upon the lands which were reserved by the Band in its treaties with the United States. The timber located on those reserved lands provided economic benefits to tribal members.

Subsequent to the execution of the treaties and acts of Congress and the President, and in reliance thereon, members of the Band continued to harvest timber for subsistence and commercial purposes upon tribal lands. Such timber harvesting provided and still provides an important part of the subsistence and livelihood for tribal members.

Properly interpreted, it is clear that the Indian signers to the treaties did not intend that use of natural resources, such as forests, would be taxed by the very government that was

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[3] Opinion by Breyer, J., with whom Stevens, O'Connor and Souter, JJ., joined.

guaranteeing continued use of these resources. Properly interpreted, the Internal Revenue Code (26 U.S.C. § 1 and § 11) does not impose income tax on income derived from timber harvesting by Band members. Thus, imposition of income tax on petitioners Brun income, derived from those resources is a violation of their treaty rights and prohibited by law.

5.3 The Rules of Treaty Construction.

Over the years, this Court has determined rules for the interpretation and enforcement of treaties between the United States government and American Indian tribes. Applying these principles makes it abundantly clear that the treaties involved here must be construed to avoid taxation of income generated by harvest of the tribe's natural resources. Among these principles are the following:

The Indians held all natural resources prior to white colonization. Thus, as a general matter, the treaties do not represent a grant of rights from the United States to the Indians. Instead they constitute "a grant of rights from . . . [the Indians and] a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905).

A treaty is to "be construed, not according to the technical meaning of its words to learned lawyers, but in a sense in which they would naturally be understood by the Indians." *Washington v. Fishing Vessel Association*, 443 U.S. 658, 675 (1979), citing *Jones v. Meehan*, 175 U.S. 1, 11 (1879). The Supreme Court has regularly used these canons of construction to broadly interpret the rights accorded to Indian tribes by the Treaties. *See United States v. Winans*, *supra*; *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *Tulee v. Washington*, 315 U.S. 681 (1942); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, *supra*, 443 U.S. at 676, 679.

Rights guaranteed by treaty are property rights and may not be taken except by explicit decision of the United States Congress and with full compensation. *See, United States v. Sioux Nation*, 448 U.S. 371 (1980); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002 (8th Cir. 1976); *See, also, Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *Hynes v. Grimes Packing Co.*, 337

U.S. 86, 105 (1949); *Whitefoot v. United States*, 293 F.2d 658, 659 (Cl. Ct. 1961).

The Supreme Court has held that intent of the Indian signers is crucial:

> A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations. E.g., Lone Wolf v. Hitchcock, 187 U.S. 553. When the signatory nations have not been at war and neither is the vanquished, it is reasonable to assume that they negotiated as equals at arm's length.
>
> . . .
>
> Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side.

Washington v. Fishing Vessel Association, 443 U.S. 658, 675 (1979)

It is axiomatic that Indian treaties, statutes, agreements and executive orders are to be construed liberally in favor of the Indians. *See*, *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912). This doctrine of construction requires that ambiguities in the language of these documents be resolved in favor of the Indians. *See*, *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 174 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). In addition, violation of Indian treaties is a constitutional matter, *infra*, § 2.5.

5.4. The Precepts of Treaty Interpretation Do Not Require a Facial Ambiguity.

Refusing to delve into the intent and understanding of the signatories to the Chippewa treaties, the lower courts accepted the government's argument that there is a special rule when taxation matters are involved, namely that there must first be an ambiguity before the precepts of interpretation are applied. Thus, the Court of Appeals looked in vain for "treaty language which

conferred an income tax exemption . . . ." *See,* Opinion of August 10, 1995, p. 4. Appendix E hereto.

But, there is no special rule involving the need for ambiguity before the precepts of treaty interpretation and construction can be applied. As best stated in Felix S. Cohen's Handbook of Federal Indian Law:

> In construing Indian treaties, the courts have required that treaties be liberally construed in favor of Indians, that ambiguous expressions in treaties must be resolved in favor of the Indians, and that treaties should be construed as the Indians would have understood them. These precepts represent an acknowledgment of the unequal bargaining position, based partially on the United States' superior negotiating skills and knowledge of the language. One consequence of this is that many important protections have been held by the courts to be reserved implicitly by the treaties.

Felix S. Cohen's Handbook of Federal Indian Law, p. 222 (Renard Strickland ed., 2d ed. Michie 1982)(footnotes omitted).

Clearly, construing ambiguities is but one of the applications of the general concept of liberal interpretation favoring the Indian intent. And, this Court has made it clear that analysis of a treaty intent and purpose is required, even though there is no "treaty language conferring an income tax exemption." *Oklahoma, supra.*

Applying the rules of liberal construction and the need to ascertain the intent of the Indians has led the courts to imply the existence of reserved water rights (*e.g., Winters v. United States*, 207 U.S. 564 (1908)), the right to hunt and fish (*e.g., Menominee Tribe v. United States*, 391 U.S. 404 (1968)), and the reservation of tribal self-government free of state jurisdiction (*e.g., McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973)). *See,* Handbook *supra*, at 223.

In most, if not all, of these cases, there has been no "ambiguity" which has led the court to look into the Indian intent in signing the treaties. Indeed, the documents concerned in those

cases, generally failed to mention, at all, these important rights, just as the Treaty of Dancing Rabbit Creek involved in *Oklahoma* failed to mention taxation. The Treaty of Dancing Rabbit Creek provided that ". . . no territory or state shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People . . ." *Oklahoma Tax Commission v. Chickasaw Nation, supra,* p. 2223. Here, the Treaty of Greeneville provides that the Tribe shall have a right to certain lands and to "quietly to enjoy them . . . without any molestation from the United States . . ." Treaty of Greeneville, art. V, II C. Kappler at 42. Obviously, the language of the Treaty of Greeneville is no more or less ambiguous than the language of the Treaty of Dancing Rabbit Creek. Just as there was no need to find explicit language discussing taxation in *Oklahoma* there is no need to find language here discussing taxation.

The Court of Appeals' insistence that it must "find" Treaty language which infers an income tax exemption is simply incorrect and contrary to the teaching of *Oklahoma*. The rights in *Winters, Menominee* and *McClanahan* were implied from the surrounding facts and the intent of the signers. Freedom from taxation is no less important than these rights. Yet the Court applies a different rule to taxation to find that the intent of the treaty signatories and the understanding of the Indians, can be delved into only if there is a specific provision which somehow mentions taxation and which is somehow ambiguous so that the Court's inquiry can be triggered.[4] There is no such rule. Rather, there are several "precepts" which, taken together, mandate inquiry into the Indians' understandings of the treaty.

In the leading case of *Choate v. Trapp*, 224 U.S. 665 (1912) this Court applied the precepts of interpretation to a real life situation. There, the state argued that tax exemptions should be strictly construed and that such an exemption would be withdrawn at any time the government saw fit. *Choate, supra*, at 675.

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[4] Indeed, in the leading case of *Squire v. Capoeman*, 351 U.S. 1 (1956), the Supreme Court found an implied tax exemption as to income where land was to be preserved "free of encumbrances." There was no mention of taxation in the statute at question.

The Court rejected this view ruling:

> . . . but in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than one hundred years, and has been applied in tax cases.

Choate, supra, at 675.

There was nothing ambiguous involved. Rather, it would have been a violation of the precepts of Indian treaty and statutory interpretation for the court to interpret the statute "in favor of" the United States. *Oklahoma* makes it clear that the treaties involved here must be viewed in a light most favorable to the Tribe.

Here, there is no express language in the treaties which is inapposite to the interpretation proposed by the Red Lake Band. Indeed, the treaty is silent in its terms as to taxation, as was the Treaty of Dancing Rabbit Creek in *Oklahoma*. Would the Chippewas have ceded their vast lands and agreed to repair to the relatively small reserved areas had they known that the resources of that reservation would be taxed? Almost certainly not. The treaty is silent on its face as to what the intentions were concerning taxation. Given this silence, it is not only permissible but mandated that the Court inquire as to the intention of the signatories to the treaty.

5.5. The Chippewa Understanding of the Treaties.

At the time of the signing of the Treaties, the Indians understood that an integral part of the right to dwell upon their lands included the right to harvest timber growing upon tribal land in order to provide material for homes, shelters, and other buildings and to provide for fuel. No federal income tax existed

and thus was not contemplated by either the United States government or the signatory tribes. *See* House Ways and Means Committee, Tax Treatment of Indian Fishing Rights Income, H.R. Rep. No. 312 Part 2, 100th Cong., 2d Sess., at 4 (1988).

It is clear that Indians would have never imagined that a recognition of their sovereignty by treaty would somehow be construed as bestowing a right to the United States to tax the income of tribal members derived from their harvest of tribal resources. *See*, Declaration of Melissa Meyer, Ph.D., (hereinafter "Meyer Decl."), Joint Appendix, p. 52a. Because use of natural resources was a critical right, it is clear that no Red Lake leader at treaty times would have understood that ceding land and entering into sovereign treaty relations with the United States would allow the government to tax such income. Meyer Decl., *supra*, p. 79a. The United States offered no evidence to the contrary in the court below.

The Chippewas also understood that their reservation was a homeland where they could dwell free from interference. The Red Lake Reservation, like many other reservations in the United States, is a result of treaties, executive orders and congressional acts. *See*, *United States v. Minnesota*, 466 F.Supp. 1382 (D. Minn. 1979). After the 1864 Treaty of Old Crossing, 13 Stat. 667 (1864), the Red Lake Reservation consisted of about 3.2 million acres. *Id.*, p. 1383. It is without question that rights to exclusive possession of the reservation, including use of its natural resources, are the same whether those reservations were created pursuant to treaty, statute or executive order. *See* Felix S. Cohen's Handbook of Federal Indian Law, p. 493 (Renard Strickland ed., 2d ed. Michie 1982) (herein after "1982 Handbook"). The United States points to no fact nor legal standard which would reduce these rights.

Indian tribes enjoy full equitable ownership of timber located upon tribal reservation lands. *United States v. Algoma Lumber Co.*, 305 U.S. 415, 420 (1939). This is true whether or not the treaty or other basis on which the tribe's reservation was established mentions timber. *United States v. Shoshone Tribe*, 304 U.S. 111 (1938). Indian tribes generally may not sell or otherwise alienate the timber on their lands without approval of the Secretary of the Interior. 1982 Handbook, *supra*, p. 539. *See also*, 25 U.S.C. §§ 461-479. Tribes have the power to prevent the sale or distribution of tribal assets and may manage, operate and

dispose of tribal property. *See, generally*, 1982 Handbook, p. 539-540; 25 U.S.C. §§ 476-477. Sale of tribal timber requires tribal consent as well as approval of the Secretary of the Interior. 25 C.F.R. § 141.7(a) (1980).

The imposition of federal income tax on an individual Indian harvesting tribal timber would clearly frustrate the purpose and nature of the reservation, and the Indian understanding of the treaty, thereby violating its implicit terms. Applying the rules of construction noted above to the Internal Revenue Code would not yield the conclusion that taxes were to be imposed thereby greatly diminishing the value of the reservation. It is clear that the canons of construction are to apply not only to treaties but that other "federal statutes as well are to be construed so far as is reasonable to do in favor of Indians." *Reich v. Great Lakes*, 4 F.3rd 490, at 492 citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766-68 (1985); *EEOC v. Cherokee Nation*, 871 F.2d 937 at 939 (10th Cir. 1989).

5.6. Authority Relied On By the Courts Below Are Inapposite to the Current Case.

The lower courts' reliance on *Jourdain v. Commissioner*, 617 F.2d 507 (8th Cir. 1980) is misplaced. [*See, e.g.,* Aug. 10 Opinion, App E., p. 23a] There is no indication that either the district court nor the court of appeal in that case was ever presented with any evidence whatsoever as to what the Red Lake Band's understanding of the Treaty of Greeneville was nor their intent in signing it. There is virtually no discussion in that case of the Treaty of Old Crossing, 13 Stat. 667 (1863), *reprinted in* II C. Kappler 853, and the Supplement to the Treaty of Old Crossing, 13 Stat. 689 (1864), *reprinted in* II C. Kappler 861. Nor does there appear to have been any evidence presented as to Indian understanding and intent with regard to those treaties. In this case, petitioners submitted substantial evidence as to the Indian understanding of the treaty. *See*, Meyer Decl.,Appendix J. The government offered nothing. Yet, this Court has repeatedly reaffirmed the need to determine the intent and purpose of Indian Treaties. *Oklahoma, supra.*

Here, imposition of a tax violates federal policy. If the income in question were earned by petitioners from their own trust allotment rather than from tribal trust land, then the income would be exempt. *Squire v. Capoeman*, 351 U.S. 1 (1956). In

Squire, the court found an implied exemption by virtue of the General Allotment Act even though the income tax statute contains no exemption for income earned from an allotment.

If the timber had been logged by the Band itself and a share of revenues then paid to the Bruns as a per capita payment, then the income would also be tax exempt. Pub. L. 98-64, 25 U.S.C. § 117; § 1407.

If the Band had done the logging and kept the income for itself, the income would not be taxable because IRS has determined that tribes are not taxable entities despite the fact that the I.R.C. contains no such rule. *See*, Rev. Rul. 94-12.

Thus, it is only because the Bruns directly received the income, that Internal Revenue Services deems it taxable. This makes no sense and violates clear federal policy.

5.7 The Court Below Violated Supreme Court Standards for Summary Judgment Under Rule 56.

The United States did not meet the requirements for summary judgment and the district court grant of judgment and subsequent affirmance by the Court of Appeals were error. The standards for a grant of summary judgment are well known. Summary judgment is proper:

> [I]f the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c).

Summary judgment should not be granted where the "moving parties' submissions have not foreclosed the possibility of the existence of . . . facts from which 'it would be open to a jury . . . to infer from the circumstances' that [the non-moving party's allegations are correct]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

In this case, a material fact is the intent of the Indian signatories to the treaties of cession. Applying the canons of construction and applicable law, it is clear that those treaties must be construed in the light most favorable to the Indians and in line with their understandings. Petitioners Brun supplied substantial evidence that the understanding of the Indians would not have been to allow the United States to tax harvest of tribal natural resources. *See generally*, Meyer Decl., Appendix J. To the extent this was controverted by the United States, it is a genuine issue as to a material fact. The government offered no contradictory evidence. The Band, as non-moving party presented evidence in its favor and any reasonable doubts should have been resolved against the government as the moving party.

A party opposing summary judgment is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence for the purpose of defeating summary judgment. *Ramsouer v. Midlin Valley*, 135 F.2d 101 (8th Cir. 1943). On appeal from an order granting a defendant's motion for summary judgment, the circuit court of appeals must give the petitioners the benefit of every doubt. *Walling v. Fairmont Creamery Co.*, 139 F.2d 318 (8th Cir. 1943).

Summary judgment is not to be granted merely because the moving party appears likely, or even very likely, to prevail at trial; the summary judgment procedure is reserved for cases where "material facts are so clear that trial would be an empty exercise in formalism." *See also*, *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966) ("courts must be ever careful to grant summary judgment only when no issue of fact is controverted or turns upon choice between permissible inferences from undisputed evidence").

The court merely determines whether there are any genuine factual issues relevant to the legal issues in dispute that "may be reasonably resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255. Moreover, as the court assesses the case for that limited purpose "[t]he evidence of the nonmovant is to believed, and all justifiable inferences are to be drawn in his favor. Id. (emphasis added). Thus:

> In assessing a motion for summary judgment, all inferences to be drawn from underlying facts must be viewed in light most favorable to the party

> opposing the motion; indeed, the record must reveal that the party opposing the motion would not be entitled to prevail in any discernible circumstances.

Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984). *See also*, *Masson v. New York Magazine, Inc.*, 111 S.Ct. 2419 (1991); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990); *Shields v. Eli Lilly & Co.*, 895 F.2d 1463 (D.C. Cir. 1990).

To survive respondent's motion, the petitioners "need only present evidence" which might lead to a judgment in his favor. *Anderson, supra.* at 255; *Commercial Union Insurance Co. v. Schmidt*, 967 F.2d 270 (8th Cir. 1992). Reasonable doubts touching the existence of genuine fact must be resolved against the movant. *United States v. Farmers Mutual*, 288 F.2d 560 (8th Cir. 1961).

Even if the moving party has made out a case that would authorize a grant of summary judgment, a court need not grant the motion if for any reason the fairer course is to proceed to trial rather than resolve the case on motion. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948). This Court has specifically applied this rule to preclude summary judgment for the United States in cases involving the status of Indian land. *Arenas v. United States*, 322 U.S. 419 (1944). Here, a fairer course would be to inquire as to the Indian intent in signing the treaties.

The burden of establishing the nonexistence of a genuine issue of material fact was on the government as the party seeking summary judgment. Fed. R. Civ. P. 56(c). The party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings and other materials which it believes demonstrate the absence of a genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317 (1986).

In this case, the government offered no hint as to how it would meet the requirements of the rule. The government did not argue that no issues of material fact existed nor did it identify which of the Petitioners claims were inadequate. The government simply argued that the Petitioners' claims could not prevail as a

matter of law. This is incorrect, as correct interpretation of the treaties is a central and material fact to this dispute.

Even had the government made a prima facia showing either evidence negating an essential element of the Petitioners claims or that the Petitioners evidence was insufficient to establish an essential element, it failed to carry its burden of persuasion under Rule 56.

Assuming arguendo that the government carried its burden of proof, it still did not carry its burden of persuasion because the Bruns established, on the record, the existence of sufficient evidence to indicate the existence of genuine issues of material fact. *See generally*, Meyer Decl.; Appendix J. Only if a moving party carries its initial burden of persuasion under Rule 56, does that burden shift to the non-moving party, who must either rehabilitate the evidence attacked in the moving party's papers, produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e) or submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). *Celotex*, 477 U.S. at 333 n.3 (citing 10A Wright, Miller & Kane § 2727, p. 138-43).

A primary issue of fact in this case is the intent of the Indian signatories to the treaties involved here. The Bruns submitted ample evidence that support their views. The government supplied nothing.

Thus, the United States did not meet the requirements for summary judgment and the district court grant of judgment and court of appeals affirmance were error. Fed. R. Civ. P. 56(c).

Applying the analysis required by *Oklahoma* leads to the conclusion that summary judgment was improper. Rule 56 allows granting of a summary judgment motion against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23 (1986).

Here, the district court completely ignored the need to determine the Indian intent in signing the treaty and found that there were ". . . no genuine issues of material fact . . . ." with reference to treaty interpretation. Order of August 26, 1994,

Appendix C. The Court of Appeals agreed. These rulings ignore the command that Indian intent be determined. *Oklahoma, supra.*

5.8. Taxation of Tribal Income Derived from Tribal Natural Resources Fringes Upon Tribal Self-Governance.

In *Oklahoma Tax Commission v. Chickasaw Nation, supra,* in finding that the State's income tax on tribal members living inside the reservation was permitted, the majority of five noted:

> Notably, the tribe has not asserted here, or before the Court of Appeals, that the State's tax infringes on tribal self-governance.

Oklahoma Tax Commission, supra, p. 2223.

In this case, however, the tribe has asserted that taxation is in interference with tribal policies and goals and this assertion has not been denied nor countered by the United States.

Imposition of federal income tax upon timber harvested by individual members upon tribal lands diminishes the value of all tribal timber. The value of the Band's timber that is the subject of the permit, which already is not amenable to harvest by ordinary commercial contract, decreases by the amount of federal income tax assessed on the proceeds derived by the individual member. The value of tribal timber that is suitable for harvest by commercial contract is diminished by the presence of unharvested timber that impedes timber growth and commercial harvest. Imposition of federal income tax upon proceeds derived from the harvest of tribal timber upon tribal lands by tribal members frustrates the congressional policies of self-determination and self-governance of federally recognized Indian tribes as well as the goal of maintaining a tribal timber program to provide for the long-term benefit of members of the Band.

The Band determined that the harvest of tribal forest products provides benefits to the members of the Band. When volumes or values are sufficiently small that formal contract sales are deemed unnecessary, or to expediently remove timber damaged by natural causes to minimize further loss in value, timber harvesting is accomplished through paid or free use timber cutting permits or free use without a permit. Complaint. ¶ 5.8.

The timber cutting permit is the primary instrument used to sell tribal timber on the Red Lake Diminished Reservation. On the Diminished portion of the Red Lake Reservation, only tribal members may be granted a permit to harvest and sell timber. *See, e.g.,* U.S. Department of Interior, Bureau of Indian Affairs, Red Lake Agency, "Policy Statement for Cutting of Forest Products Under Permit on Lands of the Red Lake Band of Chippewa Indians (FY 1981)", originally attached to Petitioner's Complaint.

Tribal members who are issued cutting permits of any kind may not allow the cutting or skidding of timber by nonmembers, other than family members of their household residing on the Red Lake Reservation. Complaint. ¶ 5.12.

Revenue from timber sales is vital to the Band, for it allows the Band to provide essential governmental services to its members residing on the Reservation. Complaint. ¶ 5.7. It is vital since natural resources still serve as the basis for virtually all non-governmental employment on the Red Lake Reservation. Meyer Decl., Appendix J., p. 74a.

Until relatively recently, tribal sawmills have served as a source of reservation income for more than fifty years providing nearly one-third of the non-public employment on the reservation. *Id.*, p. 75a. As sawmill operations have declined, tribal members, like the Bruns, have come to rely more on the older tradition of individual timber sales. *Id.*, p. 76a.

Commercial rice operations in other states have depressed that agricultural enterprise increasing the dependence on other natural resources such as timber. Meyer Decl., p. 76a.

Economic conditions at Red Lake fall below the national average for Indians. The average unemployment rate approaches, and seasonally surpasses, fifty percent. The average per capita income falls below the poverty level. Meyer Decl., p. 77a.

Thus, the assessment of federal income taxes upon tribal members' income derived from their harvest of tribal timber infringes on the Bands self-governance determination to maximize economic benefits to its members from timber resources.

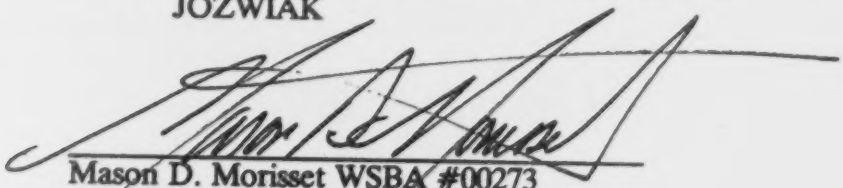
6. CONCLUSION.

Both the Circuit Court and District Court's refusal to investigate the intent and purposes of the treaties entered into by the Red Lake Band through a review of historical material is incorrect and clear error. The Red Lake Band submitted substantial historical material, the United States produced nothing. This insufficient for a finding of summary judgment, and such judgment is error. Although reaching different results on the merits, all nine justices of this Court agree that determining the purpose and intent of a treaty as to taxation is necessary and that resort to historical materials is appropriate for such review. *Oklahoma, supra.*

When read in the greater context of Indian law, the Red Lake Band treaties with the United States government must be interpreted to protect their natural resources from income taxation by the federal government. The government offered no factual underpinning that would support a finding that the intent of the treaty signors was any different. In that case, granting summary judgment to the party opposing the moving party is the proper procedure. *See, e.g., Portsmouth Square, Inc., v. Shareholders Protective Committee*, 770 F.2d 866 (9th Cir. 1985)("*sua sponte* summary judgment is appropriate where one party moves for summary judgment and, after the hearing, it appears from all evidence presented that there is no genuine issue of material fact and the non-moving party is entitled to judgment as a matter of law."). *Northland Greyhound Lines v. Amalgamated Ass'n.*, 66 F.Supp. 431 (D. Minn. 1946). The court below erred in granting the government's motion and refusing to grant the Bruns summary judgment.

Respectfully submitted this 10th day of January, 1996.

MORISSET, SCHLOSSER, AYER & JOZWIAK



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